



FH

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/157670

PRELIMINARY RECITALS

Pursuant to a petition filed May 16, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. in regard to Medical Assistance, a hearing was held on June 26, 2014, at Port Washington, Wisconsin.

The issue for determination is whether the case management organization (CMO) correctly discontinued Petitioner's participation in a recreational activity program based upon his residency in an adult family home which is required to provide recreational activities.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Leslie Gannon

Community Care Inc.
1333 West Towne Square Road
Mequon, WI 53092

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of [REDACTED] County.

2. Petitioner is a Family Care Program (FCP) participant. He is 25 years of age and resides in a three bed Adult Family Home (AFH). That placement was in early 2014. His diagnosis includes, though is not necessarily limited to, Down's syndrome, autism and epilepsy. If his attention is not engaged with an activity, Petitioner displays behaviors incompatible with his well-being. For example, he has walked away from activities in the past and wandered unsupervised into the community, he can engage in obsessive-compulsive behaviors, he can become self-injurious and may act out by hitting himself.
3. One of the FCP services that has been in place for Petitioner has been recreational activities through Portal, Inc. This provided Petitioner with social activities in the community.
4. With Petitioner's placement in the AFH the FCP agency notified him that it is discontinuing the Portal service as it concluded that the activities provided by Portal are part of the services that an AFH is required by law to provide to residents. As an example, the AFH activities for the month of June included the following: movies - 3 times, bowling - 3 times, walking or biking in neighborhood - 5 times, grocery shopping - 2 times. In fairness to the FCP, it is noted that June activities also included a sock hop with another AFH, a trip to Cabelas and a camping/fishing/canoeing outing.
5. Petitioner is seeking participation in 3 activities per month with Portal. These would be weekday activities as Petitioner tends to spend weekends back to his family home. Portal activities are detailed (and contrasted with the AFH activities) at pages 23-88 of Exhibit # B.

DISCUSSION

The Division of Hearings and Appeals can only exercise authority that has been delegated to it. With respect to Family Care the Wisconsin Administrative Code delegates hearing authority where the appeal is directly to the Division of Hearings and Appeals as follows:

...

- (a) Denial of eligibility under s. DHS 10.31 (6) or 10.32 (4).
- (b) Determination of cost sharing requirements under s. DHS 10.34.
- (c) Determination of entitlement under s. DHS 10.36.
- (d) Failure of a CMO to provide timely services and support items that are included in the plan of care.
- (e) Reduction of services or support items in the enrollee's individualized service plan, except in accordance with a change agreed to by the enrollee.
- (f) An individualized service plan that is unacceptable to the enrollee because any of the following apply:
 1. The plan is contrary to an enrollee's wishes insofar as it requires the enrollee to live in a place that is unacceptable to the enrollee.
 2. The plan does not provide sufficient care, treatment or support to meet the enrollee's needs and identified family care outcomes.
 3. The plan requires the enrollee to accept care, treatment or support items that are unnecessarily restrictive or unwanted by the enrollee.
- (g) Termination of the family care benefit or involuntary disenrollment from a CMO.
- (h) Determinations of protection of income and resources of a couple for maintenance of a community spouse under s. DHS 10.35 to the extent a hearing would be available under s. 49.455 (8) (a), Stats.
- (i) Recovery of incorrectly paid family care benefit payments as provided under s. DHS 108.03 (3).
- (j) Hardship waivers, as provided in s. DHS 108.02 (12) (e), and placement of liens as provided in ch. HA 3.

(k) Determination of temporary ineligibility for the family care benefit resulting from divestment of assets under s. DHS 10.32 (1) (i).

...

Wis. Admin. Code, § DHS 10.55(1); also see Stats., §46.287.

It is clear that the discontinuance of Petitioner's Portal services does fall within the legal authority of the Division of Hearings and Appeals.

The CMO points out that an AFH is required by law to provide recreational activities to its residents:

DHS 88.07 Resident care. (1) GENERAL REQUIREMENTS.

...

(c) The licensee shall plan activities and services with the residents to accommodate individual resident needs and preferences and shall provide opportunities for each resident to participate in cultural, religious, political, social and intellectual activities within the home and community. A resident may not be compelled to participate in these activities.

...

Wis. Admin. Code, §88.07(c).

The provider notes that Petitioner also has volunteer opportunities at a local church, library and Humane Society.

Petitioner's family argues that Petitioner is not interested in movies or bowling and that walks in the neighborhood are not the same as activities provided by Portal and do not provide Petitioner with the type of activity that maximizes his potential. It is also noted that he is 25 and his AFH roommates are 20-25 years older – men in their 40's or 50's. It is also noted that Petitioner needs the stimulation of the Portal programs to keep him from self destructive behaviors.

Though the AFH efforts at socialization are certainly pleasant activities, I am not convinced that the AFH activities are a complete substitute for the Portal activities for Petitioner. The evidence convinces me that, though life has certainly dealt Petitioner some disadvantages, he is young and vibrant and needs more, and more varied, stimulation as to both the activities and the mix of participants than the AFH activities provide at this time. I am, therefore, approving the continuation of Portal but not without some restrictions. The Portal cost structure is not precisely clear to me. Apparently Portal charges a base charge of about \$60.00 per activity (per testimony of Petitioner's mother) but it is also seems that there are additional charges for tickets, meals and the like that may be part of any particular activity. It is not clear as I write this how these charges are paid for. My approval of Portal activities is not intended to be an open ended approval of any dollar amount for FCP payment. I am, therefore, limiting the approval to three Portal activities a month but with a total cost to the FCP not to exceed the base cost of the activity. The parties are free to make other arrangements as to payment outside of that approval.

CONCLUSIONS OF LAW

That the best available evidence indicates that Petitioner's participation in Portal activities should continue.

THEREFORE, it is

ORDERED

That this matter is remanded to the case management organization with instructions to take the steps necessary to continue Petitioner's participation in Portal activities at a frequency of up to 3 times per month but with the cost limited for FCP payment to the base price of the Portal activity.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 31st day of July, 2014

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 31, 2014.

Community Care Inc.
Office of Family Care Expansion